EXHIBIT A

CASE NO. 528550

Supreme Court of the State of New York
Appellate Division – Third Department

LARRY J. AND MARY FRANCES MAISTO, JULIE RODRIGUEZ, LORI L. COBB, THOMAS POPE, MARK AND JENNIFER PANEBIANCO, GRACE G. JOHNSON, Parents of Students in the Jamestown City School District as Representatives of Their Minor Children, CHRISTOPHER J. FARRELL, Parent of a Student in the Kingston City School District as Representative of His Minor Child, CURTIS L. BREWINGTON, SR., Parents of Students in the Mt. Vernon City School District as Representative of His Minor Children, NELLIE STEWART, ROBIN JOHNSON, EDWARD POPPITI, DAWN FUCHECK, PAMELA R. RESCH, SHARON CURRIE, LEONA M. FREE, ELIZABETH ROBINSON, ZSA ZSA HOLMES, TANISHA JACKSON, ALMETRA MURDOCK, TONIA PARKER, Parents of Students in the Newburgh Enlarged City School District as Representatives of Their Minor Children, DAWN RALPH, Parent of a Student in the Niagara Falls City School District as Representative of Her Minor Child, KELLY DECKER, Parent of a Student in the Port Jervis City School District as Representative of Her Minor Child, SAKIMA A.G. BROWN, Parent of a Student in the Poughkeepsie School District as Representative of Her Minor Child, ALESIA MCDANIEL, RHONDA ANGRILLI-RUSSELL, ZULIA MARTIN, Parents of Students in the Utica City School District as Representatives of Their Minor Children,

Plaintiffs-Appellants,

v.

STATE OF NEW YORK,

Defendant-Respondent.

Brief for Amicus Curiae, New York Civil Liberties Union

STEFANIE D. COYLE
ARTHUR EISENBERG
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 BROAD STREET, 19TH FLOOR
NEW YORK, NEW YORK 10004
212.607.3300

Dated: July 22, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

INTRODUCTION

This appeal raises crucial questions regarding the constitutional duty of the State of New York to provide all children with "the opportunity" to receive a "sound basic education." In October 2017, this Court reversed a decision of the Albany County Supreme Court that had dismissed this suit and then returned the case to the court below, finding the trial court failed to properly consider and apply the constitutional standards articulated by the Court of Appeals with respect to the Education Article of the New York Constitution. Unfortunately, the trial court has again failed to address adequately the constitutional claims presented here by parents on behalf of their children.

The eight small city school districts in this case have struggled to provide the opportunity for a sound basic education for their students due to insufficient financial and non-monetary assistance from the State. Throughout a twenty-nine-day trial, the plaintiffs presented ample evidence of gaps in the critical "inputs" that make for "a sound basic education" in each district. Those "inputs" include high quality educators and curriculum; adequate facilities; the basic instrumentalities of learning, including supplies, textbooks, and computers; and additional supplemental services, including social workers and academic support for students who are struggling. The plaintiffs showed, through considerable evidence from witnesses and experts, that the districts were not able to provide "inputs"

sufficient to confer the opportunity to receive a sound basic education that is guaranteed to all students across the state through the Education Article of the New York Constitution.

The plaintiffs also presented evidence of the dismal results that substandard education produces – low graduation rates, high dropout rates, low standardized test scores, and districts with multiple schools designated as the lowest academic performers in the state. In fact, the lower court acknowledged that the "outputs" used to measure these schools' performance were "undeniably inadequate" and "not acceptable." *Maisto v State*, 154 AD3d 1248, 1254 [3d Dep't 2017] (citing *Maisto v State*, 56 Misc 3d 295, 299 [Sup Ct, Albany County 2016]) (quotation marks omitted). Despite this finding and overwhelming evidence that the school districts' "inputs" were inadequate and seriously deficient, the trial court found that the "inputs" in each of the eight districts were "adequate to provide the opportunity for a sound basic education to its students." *Maisto v State*, Sup Ct, Albany County, Jan. 10, 2019, O'Connor, K., Index No. 8997-08, Decision and Order/Judgment at 23 ("*Maisto* 2019").

On remand from this court, the Supreme Court was instructed to make detailed findings considering "whether the evidence of inputs, outputs and causation establish that defendant has failed to provide constitutionally sufficient" assistance. *Maisto v State*, 154 AD3d at 1253. Yet the trial court, through its cursory and rote

review of the "inputs," disregarded important factual evidence and made findings that were against the weight of the evidence. The facts in the record showed that the children did not receive "a sound basic education," in part, because of large class sizes, high student-to-teacher ratios, dangerous and unacceptable facilities, and a lack of support services for students.

These flawed factual findings reached by the court below rested upon an equally flawed analytic structure. Indeed, the decision of the court below rested upon three fundamental errors of law that guided the court to the wrong result in this case.

First, the trial court failed to appreciate the inextricable relationship between "inputs" and "outputs" in evaluating plaintiffs' claims. The lower court repeatedly announced that the Constitution only promised an "opportunity" to receive a "sound basic education" and that not every child will succeed regardless of the sufficiency of "inputs." The trial court utilized these undisputed observations as an excuse to consider "inputs" as though they were entirely divorced from "outputs." But the constitutional adequacy of "inputs" cannot be assessed without considering the sufficiency of "outputs." Indeed, the Education Article of the New York Constitution, as interpreted by the Court of Appeals, requires courts to engage in a cost-benefit analysis in which "inputs" must be evaluated in relation to the scope of "output" deficiencies.

This inter-dependent relationship between "inputs" and "outputs" is demonstrated by the following example. If only one or two children in a class were reading below grade level, that fact might allow the presumption that the "inputs" (teaching, instrumentalities, facilities, and support services) are constitutionally sufficient. But, if an overwhelming number of children were reading significantly below grade level, such a circumstance invites an appropriate skepticism regarding the sufficiency of "inputs" and a court should properly erect a presumption that the reading lessons are inadequate in evaluating the constitutional sufficiency of the "inputs." Such a presumption might require an inference of inadequacy or, at the least, elevate the burden of justification or acceptability that the State might need to satisfy.

As discussed more fully below, there is no single standard or metric for measuring the constitutional sufficiency of "inputs." The sufficiency of "inputs" can only be evaluated alongside "outputs." The two are inextricably bound together as this Court and the Court of Appeals have recognized (*Campaign for Fiscal Equity, Inc. v State,* 100 NY2d 893, 908 [2003] ("*CFE II*"); *Maisto v State*, 154 AD3d at 1249-50). In this case, however, the trial court analyzed "inputs" without seriously considering the scope of "output" deficiencies and reached arbitrary conclusions grounded in neither logic nor law.

Second, the trial court compounded this error in failing to adhere to the admonition previously issued by this Court that the judiciary "must perform its duty 'to define, and safeguard, rights provided by the [New York] Constitution'" and that "[n]o deference is due the Legislature when applying the *CFE II* factors to determine whether there is a [constitutional] violation in the first instance." *Maisto v State*, 154 AD3d at 1250, 1253. Indeed, the trial court continued to regard the trial as though it were about "remedy" rather than "liability" and continued to insist that judicial intervention "'may be invoked in only the narrowest circumstances.'" *Maisto* 2019 at 10. This deferential approach toward the State explains the trial court's grudging and resistant analysis of plaintiffs' claims and the erroneous conclusions that it reached in evaluating the "inputs" provided to the children in this case.

Third, the trial court erroneously discounted examples of constitutionally deficient "inputs" that could have been remedied by non-fiscal intervention on the part of the State. The plaintiffs' request for injunctive relief was not necessarily limited to financial remediation. In reaching this decision on liability by discounting non-monetary deficiencies, the court below also erred.

In addition, the court below improperly dismissed evidence regarding additional support services as "aspirational" and attributed many of the deficiencies

in the "outputs" to school district mismanagement, both of which were error. Each of these matters will be amplified in the Argument below.

The New York Civil Liberties Union, as *amicus curiae,* urges this Court to reverse the January 10, 2019 decision and order of dismissal in this case upon the grounds that the Albany County Supreme Court committed significant errors of law that resulted in clearly erroneous fact-finding by the court below. This Court should correct the errors below and apply a proper legal analysis and, in the interest of judicial economy, reach its own findings of fact on the ample factual record developed below. Such an approach is well within the jurisdictional authority of this Court. *Matter of Hall v Barnes*, 225 AD2d 837, 839 [3d Dep't 1996].

This Court should, therefore, "grant the judgment which upon the evidence should have been granted by the trial court" at this stage of the case — namely, a declaration that the State failed to provide adequate financial and non-monetary assistance to provide in each district the opportunity for a sound basic education. Further, given the lower court's repeated errors, this Court should appoint a referee to determine the correct remedy for the constitutional violations that must be recognized and remedied in this case. *Matter of In re Civ. Serv. Employees Ass'n Inc., Local 1000, AFSCME, AFL-CIO (State)*, 273 AD2d 668 [3d Dep't 2000].

In addressing these points, *Amicus* adopts the arguments presented by plaintiffs and seeks here to supplement and amplify those arguments.

INTEREST OF AMICUS CURIAE

The New York Civil Liberties Union (the "NYCLU") is the New York State affiliate of the American Civil Liberties Union. As such, the NYCLU is deeply devoted to the protection and enhancement of fundamental constitutional rights. Among the most fundamental of rights is the right, secured by the Education Article of the New York Constitution, to the opportunity for a "sound basic education." In view of that, the NYCLU submitted *Amicus Curiae* briefs to the Court of Appeals in 1995 and 2003, when the *Campaign for Fiscal Equity* cases were previously before the Court of Appeals. The NYCLU also submitted an *Amicus Curiae* brief to this Court in 2017 during the first appeal of this case.

Amicus submits this brief because this appeal raises important issues regarding how children and their parents may enforce the constitutional right to "the opportunity" to receive a "sound basic education." *Campaign for Fiscal Equity, Inc. v State*, 86 NY2d 307, 316 [1995] ("*CFE I*"). The analysis offered by the lower court in this case is bereft of logic and law. If followed by other courts or affirmed by this Court, the trial court decision would convert the constitutional right set forth in the Education Article into an empty promise.

ARGUMENT

I. This Court Should Correct the Legal Errors Committed by the Trial Court, Should Independently Review the Evidence Presented at Trial, and Grant the Judgment Warranted by the Record, Namely a Finding of a Constitutional Violation.

A. The Trial Court's Analysis was Legally Flawed.

In reliance upon the Court of Appeals' decision in *CFE II*, this Court directed the trial court in this case to "consider whether the evidence of inputs, outputs and causation establish that [the State] has failed to provide constitutionally sufficient" support for public education on a district by district basis. *Maisto v State*, 154 AD3d at 1253. In doing so, this Court recognized that questions regarding the sufficiency of "inputs," "outputs" and "causation" are inter-dependent.

In *Campaign for Fiscal Equity, Inc. v State of New York* (86 NY2d at 318) and in *CFE II* the Court of Appeals insisted on an inquiry into the "correlation" or "causal link" between "inputs" and the "poor performance" of the school children. The *CFE II* Court further observed that no absolute standard for evaluating "inputs" should be imposed. Using class size as an example, the Court of Appeals observed that "plaintiffs' burden was not to prove that some specific number is the maximum class size beyond which children 'cannot learn.' It is difficult to imagine what evidence could meet a burden so formulated." *CFE II*, 100 NY2d at 912. But, without a fixed standard for measuring deficient "inputs," an assessment of the scope of deficient "outputs" is essential to evaluate properly

the correlation or causal link between "inputs" and "outputs" so as to reach any judgment, at all, about the sufficiency of "inputs."

This proposition was made clear in *Campaign for Fiscal Equity, Inc. v State* (8 NY3d 14 [2006] ("*CFE III*")). In *CFE III* the Court of Appeals approved an analysis, offered by the Zarb Commission, that identified the scope or level of "output" proficiency necessary to provide a "sound basic education" and then considered the resources necessary to achieve that level. Resources or "inputs" below that level were regarded as insufficient. 8 NY3d at 24.

The *CFE III* decision exposes the error committed by the trial court in this case. Here the court below recognized that "[t]he performance of the children in [the] school districts [at issue in this case] is undeniably inadequate" and that "[t]he inadequacy of outputs is generally agreed upon by [the] parties." *Maisto* 2019 at 7. But, in evaluating the "inputs" in this case the court never assessed these "inputs" in relation to the scope of the deficient "outputs."

Had it done so, it could have examined the scope of the deficient "outputs" and then imposed varying levels of legal presumptions in drawing inferences about the sufficiency of "inputs." For example, in circumstances where the "output" deficiencies are consistently and overwhelmingly deficient, the court should impose a "strong presumption" that the "inputs" are also insufficient. Where "outputs" are widely and significantly deficient, the State should be required to

demonstrate the sufficiency of the "inputs" with "clear and convincing evidence." But, where "outputs" are only moderately deficient, the State might be required to show, by a "preponderance of evidence" that the "inputs" are adequate.

The use of legal presumptions to elevate judicial scrutiny in the assessment of constitutional injuries is not uncommon. The application of "strict scrutiny" in evaluating the deprivation of fundamental rights or discrimination against "suspect classifications" are examples of the application of legal presumptions in the adjudication of constitutional claims. For example, a law that imposes a substantial burden on the fundamental right to vote is presumptively impermissible and will be invalidated unless the State can show that it is "necessary" to advance a "compelling [] interest." *Dunn v Blumstein,* 405 US 330, 337 [1972]. A law that imposes a less substantial burden will be subjected to less rigorous scrutiny. *Anderson v. Celebrezze*, 460 US 780, 788-789 [1983]. So understood, presumptions of varying degrees of scrutiny provide courts with a flexible analytical process for applying cost-benefit analyses in constitutional cases.

In this constitutional case, the court below engaged in a flawed analytical process. The constitutional sufficiency of the "inputs" could not be determined without considering the degree to which the "outputs" were deficient. The trial court failed in this regard. Ignoring the scope of "output" deficiencies left the court without any real basis for determining, with regard to "inputs," how much

was enough. And where, as here, the "outputs" were seriously deficient the court should have treated with considerable suspicion the State's claim that the "inputs" were sufficient. The court should have erected and applied a legal presumption that the "inputs" were constitutionally unacceptable. This the court failed to do.

The trial court compounded this error by continuing to insist that "'[j]udicial intervention'" should occur "'in only the narrowest circumstances'" and that "the bar" for establishing a constitutional violation "was appropriately set very high." *Maisto* 2019 at 10. The court below again regarded the trial as pertaining to "remedy" rather than "liability." This mindset colored the court's consideration of plaintiffs' claims and failed to allow receptivity to the notion that, where "outputs" are severely deficient, suspicion of the sufficiency of "inputs" must be elevated.

The court below further erred in considering the State's responsibility under the Education Article of the New York Constitution as extending only to financial assistance. The State's obligation to provide "all children the opportunity of a sound basic education", is not limited to financial assistance. *CFE I,* 86 NY2d at 316. Where the State can provide managerial training, professional development, technology, or other resources and where the failure to do so results in the denial of the "opportunity of a sound basic education" courts can and should intervene to compel compliance with constitutional obligations.

In this case, the plaintiffs' complaint sought an injunction "to create and maintain a State education aid system *and* funding levels that comply with the requirements of the Education Article of the New York Constitution. . .". *Maisto v State*, 56 Misc 3d 295 [Sup Ct, Albany County 2016], Third Amended Complaint at 83 (emphasis supplied). Clearly, plaintiffs were seeking more than monetary relief.

Nevertheless, as discussed below, the trial court repeatedly discounted examples of constitutionally deficient "inputs" that can be remedied through non-fiscal intervention on the part of the State. In this regard, the court below repeatedly identified "leadership and allocation of resources" as inadequate in district after district. Yet the court seemed to regard these deficient "inputs" as beyond the scope of close judicial assessment and ultimate remediation. This too was reversible error.

B. This Court Can Correct the Legal Errors and Engage in Fact-Finding on the Current Record.

After a nonjury trial, the Appellate Division's "review is not limited to determining whether the verdict is against the weight of the credible evidence, but can extend to a review of the record as a whole and this Court may grant the judgment warranted by the record." *Matter of Hall*, 225 AD2d at 839. The court is empowered to "'independently review the probative weight of the evidence, together with the reasonable inferences that may be drawn therefrom, and grant the judgment warranted by the record while according due deference to the trial court's factual

findings and credibility determinations.'" *Kingsley Arms Inc. v Kirchhoff-Consigli Constr. Mgmt., LLC*, 173 AD3d 1506, 1507 [3d Dep't 2019] (internal quotations omitted). The Court of Appeals has held that the scope of appellate review for the Appellate Division "is as broad as that of the trial court." *N. Westchester Prof'l Park Assocs. v Town of Bedford*, 60 NY2d 492, 499 [1983]; *see also Rocky Point Drive-In, L.P. v Town of Brookhaven*, 93 AD3d 653, 654 [2d Dep't 2012], *aff'd*, 21 NY3d 729 [2013].

This Court has also observed, in the first appeal of the instant case that, "[i]n a nonjury case where the evidence is sufficient as a matter of law to support a dispositive determination, this Court has the power 'to grant the judgment which upon the evidence should have been granted by the trial court.'" *Maisto v State*, 154 AD3d at 1253 (internal citations omitted). Here, the record adduced at trial is sufficient to grant plaintiffs the relief they are seeking. During the trial, plaintiffs presented ample evidence of significant challenges faced by each of the eight small city school districts. They produced evidence on each of the inputs and outputs, and together with defendants produced 50,000 pages of exhibits and presented 37 witnesses. This court has a full record to review and an ample basis to grant the judgment warranted by the record – a finding of a violation of the Education Article of the New York Constitution.

C. The Trial Court's Factual Findings Regarding Outputs and Inputs in Each District Were Against the Weight of the Evidence.

In *CFE I*, the Court of Appeals held that the Education Article of the State Constitution "requires the State to offer all children the opportunity of a sound basic education" and that the State's failure to fulfill this constitutional mandate would give rise to a judicially cognizable cause of action. Eight years later, in *CFE II*, the Court of Appeals described the test that a court should perform to determine whether the State has met its responsibility. That test involves consideration of the specific resources made available to a school district (the "inputs") and the performance of the district's students and schools (the "outputs"). *CFE II*, 100 NY2d at 908. A court must then determine whether there is a causal link between the funding system and any proven failure to provide a sound basic education to the district's plaintiffs. *Id.* at 919.

The inputs that a court *must* consider are "teacher quality--including certification rates, tests results, experience levels and the ratings teachers receive from their principals", "[s]chool [f]acilities and [c]lassrooms" that "provide enough light, space, heat and air to permit children to learn", and instrumentalities of learning "including classroom supplies, textbooks, libraries and computers." *Id.* at 909, 911, 913. This court also admonished the trial court to consider "whether additional supplemental services—for example, academic intervention services, language services, extended learning opportunities or additional social workers—

must be provided to enable students in each of the districts to attain a sound basic education." *Maisto v State*, 154 AD3d at 1255.

The outputs that must be considered are "test results and graduation and dropout rates." *CFE II*, 100 NY2d at 908. The trial court in *CFE II* noted that the rate of school completion can be "symptomatic of 'system breakdown'" and that "dropouts typically are not prepared for productive citizenship." *Id.* at 914.

Plaintiffs also presented evidence of school and district accountability designations to show deficient outputs. At the time of trial, the New York State Education Department identified low performing districts across the state as "focus districts" and low performing schools within these districts as "focus schools."[1] The "low performance" included poor academic performance on the grades 3-8 English Language Arts ("ELA") and math exams or low graduation rates.[2] Inclusion as a focus district or focus school is clear evidence of deficient outputs – in fact, students who attend these schools can request to transfer to a different school that has not been so designated.[3]

Throughout the trial, the court heard evidence regarding deficient inputs and outputs in each of the eight districts. While a trial court's findings of fact

---

[1] *A Parent's Guide to Understanding Focus District, Focus & Priority School Identification*, New York State Education Department, available at http://www.p12.nysed.gov/accountability/documents/ParentCommunicationDocument022616.pdf [last accessed July 17, 2020].
[2] *Id.*
[3] *Id.*

should generally be afforded deference, *see Kingsley Arms Inc.* (173 AD3d at 1507), here, there are numerous examples of the complete disregard of critical facts that should have established a violation of the Education Article and findings that are clearly against the weight of the evidence. *Matter of Hall*, 225 AD2d at 839. With regard to each of the individual school districts, the trial court disregarded or discounted important facts demonstrating the constitutional adequacy of the education being provided. A full accounting is set forth in the brief submitted by plaintiffs-appellants. *Amicus*, therefore, identifies some of the most egregious examples here.

i. Jamestown City School District

In Jamestown, 47% of students scored at Level 1, the lowest possible score, on the ELA assessment and 47% of students scored at Level 1 on the Math assessment. Tr at 3726; C.X. 64; P.X. 3.[4] Nevertheless, the school district reduced its staff by approximately 24% in the 2008-2009 school year and lost nearly 200 staff in three years. Tr at 3735-3737; C.X. 64. Moreover, while approximately 70% of ninth graders entering the district's high school read below grade level, there were no reading teachers assigned to that school. Tr at 695-696. And, during the time at

[4] On New York State assessments, a score of three or four is considered proficient (Tr at 1550) and during the 2013-2014 school year, "the aggregate percent of New York State students, grades 3-8, scoring at or above level three on SED's ELA assessment in 2013-2014 was 31%." Joint Statement of Undisputed Facts, Appendix H. The aggregate percentage of students scoring at or above level three in math was 36%. *Id*.

issue, the Jamestown City School District did not employ any social workers. Tr at 701, 722, 878.

ii. Kingston City School District

Kingston was designated as a focus district, with eight of its schools also classified as focus schools. Tr at 1051; P.X. 27. Forty-three percent of students scored at Level 1 on the ELA exam and 40% of students scored at Level 1 on math. P.X. 45.

School buildings were in serious disrepair. Thirteen of seventeen student-occupied buildings were rated unsatisfactory and the district was forced to close four schools from 2012-2013.[5] Tr at 1030-1031. Other "inputs" were also plainly inadequate. Kingston had only six middle school guidance counselors to work with 2,000 students and only seven guidance counselors to work with 2,000 high school students. Tr at 1078.

iii. Mount Vernon City School District

During the 2013-2014 school year, the graduation rate in Mt. Vernon was 48% for all students.[6] Joint Statement of Undisputed Facts, Appendix H. For

[5] The trial court dismissed the testimony about the condition and overcrowding of school facilities, noting "those issues do not rise to the level of deficiencies noted by the Court in *CFE I* in the New York City schools." *Maisto* 2019 at 17, 28, 39, 50, 62, 75. This comparison to conditions in New York City was improper. The First Department recognized that "the soundness of a basic education is not measured by comparing the educational opportunities offered by other districts or other schools." *New York City Parents Union v Bd. of Educ. of the City Sch. Dist. of the City of New York*, 124 AD3d 451 [1st Dep't 2015].

[6] During the 2013-2014 school year, the average graduation rate across New York was 76% and the average dropout rate was 7%. Joint Statement of Undisputed Facts, Appendix G.

students with disabilities, the graduation rate was 23% and for students who were limited English proficient, the rate was 11%. Joint Statement of Undisputed Facts, Appendix F.

Mt. Vernon was also a focus district with six schools in the district also designated as focus schools. P.X. 27. Only 12% of students who took the ELA assessment and 15% of those who took the math assessment were proficient. Joint Statement of Undisputed Facts, Appendix H. Forty seven percent of students scored at Level 1 on ELA and 53% of students scored at Level 1 on math. P.X. 79. Only 4% of the students who took the 8th grade math exam scored proficiently. Joint Statement of Undisputed Facts, Appendix H.

There was extensive testimony at trial on the condition of the school buildings in Mt. Vernon. One elementary school was almost 120 years old at the time of trial and the newest wing was built in 1921, resulting in inadequate ventilation and poor air quality. Tr at 2267; C.X. 7. The testimony highlighted buildings with warped floors, leaking roofs, falling debris, and asbestos. Tr at 2270. In fact, all sixteen of the student-occupied buildings in Mt. Vernon were rated unsatisfactory. Tr at 4347-4348; P.X. 42.

iv. Newburgh City School District

Newburgh was a focus district and six of its schools were designated as focus schools. Tr at 4765; P.X. 27. Forty-seven percent of students scored at Level

1 on the ELA assessment and 49% of students scored at Level 1 on the math assessment. P.X. 74. Seventy-two percent of students who were limited English proficient scored a Level 1 on the math assessment. *Id*. Yet, the Newburgh City School District reduced the number of teachers in the district by over 100 from 2008-2009 until 2012-2013. Tr at 1916. In addition, kindergarten class sizes in the district were as many as 7-10 students higher than the statewide average. Tr at 2676-2680; C.X. 14.

Moreover, Newburgh did not have any school counselors at the elementary level and only six social workers for 13 schools. Tr at 1903, 2112. Newburgh also could not afford enough academic intervention teachers to address the 83 percent of students who struggled on the state math and English Language Arts exams. Tr at 2072-2073, 1896, 1900-1901.

v. Niagara Falls City School District

In Niagara Falls, during the 2013-2014 school year, there was a 60% graduation rate for all students, with a 26% graduation rate for Latinx students. Joint Statement of Undisputed Facts, Appendix F. The dropout rate was also three times the state average for the 2013-2014 school year, at 22%. Joint Statement of Undisputed Facts, Appendix G. Additionally, 46% of all students and 58% of black students scored at Level 1 on the ELA assessment, while 47% of all students and 77% of students with disabilities received the lowest score on the math test. P.X.

56. At the same time, the district failed to provide sufficient teachers. To align the student-teacher ratio in Niagara Falls with the region, the district would have needed to hire an additional 110 teachers. Tr at 3911. But the district had to cut more than 200 employees from its general fund budget over a six-year period. Tr at 1553-1554, 1557-1560; P.X. 67; P.X. 68. Moreover, Niagara Falls also did not have any social workers in the district at any grade level. Tr at 1584, 1697.

vi. Port Jervis City School District

In Port Jervis, 45% of all students and 88% of students with disabilities scored at Level 1 on the ELA exam, while 43% of all students and 83% of students with disabilities scored at Level 1 on the math exam. P.X. 50. Only 18% of students were proficient in ELA and 22% were proficient in math. Joint Statement of Undisputed Facts, Appendix H. And, school facilities in Port Jervis, particularly at the middle school, were wholly inadequate. Tr at 2162-2164; C.X. 12; P.X. 92. The trial court emphasized that the district may have had access to funding for capital improvements but disregarded the fact that the middle school building was so infected with asbestos that remediation of the existing structural problems was not possible. Further, there were only four social workers in the entire district and the facilities in the district were so lacking that academic intervention services were provided to children in meetings held on stairwell landings. Tr. at 4624. The trial court found this acceptable. *Maisto* 2019 at 74-75.

vii. Poughkeepsie City School District

In Poughkeepsie, there was a 57% graduation rate during the 2013-2014 school year for all students, and a 0% graduation rate for limited English proficient students. Joint Statement of Undisputed Facts, Appendix F. There was a 24% dropout rate for all students, and a 43% dropout rate for students with limited English proficiency. Joint Statement of Undisputed Facts, Appendix G. Poughkeepsie was designated as a focus district. P.X. 27. Only 10% students scored at Level 3 or above on the ELA exam and only 7% of students scored proficiently on the math exam. Joint Statement of Undisputed Facts, Appendix H. More than half of students scored at the lowest level on the ELA exam (60%) and more than two-thirds of students scored at the lowest level on the math exam (68%). P.X. 1. Despite this, the district was forced to cut 130 staff positions due to budget cuts from 2009-2014. Tr at 332-333. All eight of the student-occupied buildings in the district were rated unsatisfactory. Tr at 4347. Some of the buildings had been shut down due to electrical problems, others experienced leaking roofs, mold and mildew issues. Tr at 96-97, 328-329; C.X. 2.

viii. Utica City School District

In Utica, the graduation rate was 58% for all students during the 2013-2014 school year (Joint Statement of Undisputed Facts, Appendix F) and the district had a 15% dropout rate (Joint Statement of Undisputed Facts, Appendix G). Utica

was also designated as a focus district, with nine schools designated as focus schools. P.X. 27. Further, half of all students scored at Level 1 on the ELA exams (51%) and the math exams (50%). P.X. 2. For students with disabilities, 89% of students scored at Level 1 on math and 89% scored at Level 1 on ELA. *Id*. Overall, only 15% of students scored proficiently on the ELA assessment and 19% on the math assessment. Joint Statement of Undisputed Facts, Appendix H. Despite this, Utica cut 11 percent of its teaching staff in one academic year due to budget concerns (Tr at 3662-3665) at a time that enrollment in the district increased by more than 700 students. *Maisto* 2019 at 99.

Moreover, school facilities were inadequate. All student-occupied buildings had an overall rating of unsatisfactory and at one school, the roof was "so unsafe they have to close off some sections" of the school building. Tr at 546. The trial court noted that the district had access to funding through a voter-approved capital improvement project and statewide school improvement funds. However, the plaintiffs' witness noted that funds that were originally allocated to fund building upgrades and improvements were instead spent to fix deteriorated walls, a collapsed roof, and removing asbestos. Tr at 505.

In addition, the Utica schools were seriously lacking in managerial resources. There were no assistant principals in the district, leaving the principals as the sole administrators in the building dealing with discipline issues, parental

concerns, and other administrative issues. Tr at 457-458. The Utica high school also had only one psychologist for nearly 3,000 students. Tr. at 478. The district did not have the resources to provide services for English Language Learners in the many different languages spoken in the district. Tr. at 439. The trial court responded to these circumstances stating that it would be "ideal if a school district could provide every identified tool in the arsenal to combat the hurdles at-risk students face based upon outside issues" but that the district "provides language services at a basic, adequate level." *Maisto* 2019 at 109.

D. The Trial Court Improperly Dismissed Evidence Regarding Additional Support Services as "Aspirational."

While engaging in faulty legal analysis and making factual findings against the weight of the evidence, the trial court also failed to consider mandatory inputs. Both the Court of Appeals and this Court have recognized that a district might need to provide services above and beyond traditional classroom instruction in order to meet the needs of certain students. The additional supplemental services include social workers, academic intervention services, language services, or extended learning opportunities. *Maisto v State*, 154 AD3d at 1255. The trial court disregarded this mandate to consider these additional supplemental services and therefore erred in its analysis of the *CFE* factors.

The Court of Appeals in *CFE II* held that the opportunity for a sound basic education "must still 'be placed within reach of all students,' including those

who 'present with socioeconomic deficits.'" 100 NY2d at 915. The Court agreed with the official position of the Regents and NYSED in 1999 "that '[a]ll children can learn given appropriate instructional, social, and health services.'" *Id*. The Court also agreed with the analysis of the *CFE* trial court that "at-risk students need specially tailored programs, and more time spent on all aspects of academic endeavor, in order to increase their academic achievement." *Campaign for Fiscal Equity, Inc. v State*, 187 Misc2d 1, 76 [Sup Ct, NY County 2001]. These specially tailored programs may include pre-kindergarten, summer school, afterschool and Saturday programs, and literacy programs that include individual or small group instruction. *Id*.

Given the analysis from the *CFE* courts, this court understood that "[w]ith respect to causation, the Court of Appeals specifically rejected the argument that poor socioeconomic conditions excuse poor outputs or results." *Maisto v State*, 154 AD3d at 1250. This court also mandated that the trial court on remand consider "whether additional supplemental services – for example, academic intervention services, language services, extended learning opportunities or additional social workers – must be provided to enable students in each of the districts to attain a sound basic education." *Id.* at 1255.

Despite the clear mandate to consider the value of additional supplemental services, the trial court repeatedly dismissed such services as "aspirational." The trial court explained:

> A common thread of the testimony offered by each witness for the plaintiffs was that the school must provide supplemental services to students to address their challenges outside of school, including poverty, breakdown of the family structure, absence of parental guidance, challenges in communication, such as English as a second language, etc. These circumstances certainly can provide challenges to the students in the learning environment, however it is not the core mission of the educational system to repair these outside social concerns and problems. Instead the educational system must assist as a secondary actor limited to ways that will attempt to address the academic deficiencies of the students on a basic level. To go any further effectively alters the basic mission of the educational system by turning the schools into social services agencies. Put simply, the schools cannot, and should not, be held responsible for fixing all of the negative and difficult circumstances in each student's life." *Maisto* 2019 at 21.

The trial court also stated, "it would be ideal if a school district could provide every identified tool in the arsenal to combat the hurdles at-risk students face based upon outside issues; however, that ideal is not the constitutional minimum." *Maisto* 2019 at 22. The trial court misapprehends the State's obligation to provide the opportunity for a sound basic education. The Court of Appeals was clear that in order to provide an opportunity for a "sound basic education" it would be necessary to provide additional services to at-risk students, which take many

different forms. The Court understood that for certain students, only providing standard instruction would not allow them to have the opportunity of a sound basic education.

Specifically, as to social workers, the trial court stated that they are "an aspirational service that could be provided by the schools, but is not mandated by the Constitution in order to provide the opportunity for a sound basic education." *Maisto* 2019 at 23. The trial court described the crucial work of these essential school staff members as "secondary to the educational mission of the schools." *Id.* However, additional supplemental services, including social workers, are critical to ensure that the needs of all students are met. Schools that employ school-based mental health providers see improved attendance rates, lower rates of disciplinary incidents, lower rates of expulsion, improved academic achievement and career preparation and improved graduation rates.[7] Many of the small cities districts did not provide any social workers, let alone enough to meet the recommended ratio for

[7] Richard T. Lapan, et al., *Connecticut Professional School Counselors: College and Career Counseling Services and Smaller Ratios Benefit Students*, Professional School Counseling, 16(2), 117-124 [2012]; Walter S. Gilliam, et al., *Prekindergarteners Left Behind: Expulsion Rates in State Prekindergarten Systems*, Yale University Child Study Center [2005]; Richard T. Lapan, et al., *The Impact of More Fully Implemented Guidance Programs on the School Experiences of High School Students: A Statewide Evaluation Study.* Journal of Counseling & Development, 75(4), 292-302 [1997]; Kevin Tan, et al., *The Impact of School Social Workers on High School Freshman Graduation Among the One Hundred Largest School Districts in the United States,* School Social Work Journal, 39(2), 1-14 [2015].

school social workers to students of 1:250.[8] Such a critical input cannot be dismissed as an "aspirational" service, but rather should be seen as an integral part of the state's obligation to provide a sound basic education.

Despite this, the trial court refused to consider these services and instead dismissed them as "aspirational" – failing to undertake a true analysis of these inputs in each district. This was error.

E. The Trial Court Erred in Determining that School District Mismanagement Caused the Deficient Outputs in the Districts.

In a similar respect, the trial court placed responsibility for deficient educational opportunity on mismanagement by the districts themselves. The Court of Appeals made clear that the State was obligated to correct local mismanagement and to provide managerial assistance where needed. "[B]oth the Board of Education and the City are 'creatures or agents of the State,' which delegated whatever authority over education they wield. Thus, the State remains responsible when the failures of its agents sabotage the measures by which it secures for its citizens their constitutionally mandated rights." *CFE II*, 100 NY2d at 922-923 (internal citations omitted).

[8] *School Social Workers Helping Students Succeed: Recommended School Social Worker to Student Ratios*, School Social Work Association of America, available at https://aab82939-3e7b-497d-8f30-a85373757e29.filesusr.com/ugd/426a18_20108ba1b7444cada772fdabbbb79dfe.pdf [last accessed July 17, 2020].

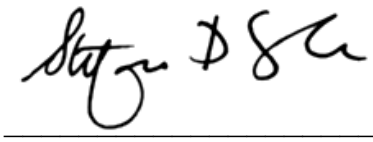
Presumably regarding managerial assistance as "aspirational," as well, the trial court often found that Districts "ha[d] adequate financial resources to provide the opportunity for a sound basic education. However, the leadership and allocation of resources must be improved to improve the outputs throughout the District." *Maisto* 2019 at 21 (Jamestown); *see also id*. at 32 (Kingston); 44 (Mount Vernon); 55 (Newburgh); 67 (Niagara Falls); 80 (Port Jervis); 93-94 (Poughkeepsie); 108 (Utica). For example, the court pointed to "failures in leadership, including the failure . . . to engage in data-driven analysis leading to effective research-based instruction practices [as] significant to understanding [Poughkeepsie and Utica's] deficiencies." *Id.* at 98, 111-112. The trial court blamed Mount Vernon's "improper allocation of resources, as well as inconsistent leadership" for the deficient outputs in the district. *Id.* at 38.

Managerial counselling by the State can be essential, not "aspirational." "[A]ny failings [of the districts] may be considered in determining the remedy" but "they do not constitute a supervening cause sufficient to decide the case for the State." *CFE II*, 100 NY2d at 925. Thus, the trial court's consideration of any alleged mismanagement by the districts at issue was improper at this stage. This also constituted error and should be reversed.

CONCLUSION

For the reasons cited above, this court should reverse the judgment of the Supreme Court, Albany County, and on the record adduced below, make a determination that the evidence presented by plaintiffs clearly shows a violation of New York's Education Article.

Respectfully submitted,



STEFANIE D. COYLE
ARTHUR EISENBERG
New York Civil Liberties Union Foundation
125 Broad Street, 19th Floor
New York, NY 1004
(212) 607-3300
scoyle@nyclu.org

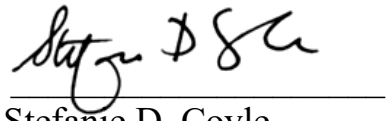
Counsel for Amicus Curiae
New York Civil Liberties Union

Dated: July 22, 2020
New York, NY

CERTIFICATE OF COMPLIANCE

Pursuant to Section 1250.8(j) of the Practice Rules of the Appellate Division, I certify that the foregoing brief was prepared on a computer using Microsoft Word, using 14-point Times New Roman proportionally spaced typeface, double-spaced, with 12-point single-spaced footnotes and 14-point single-spaced block quotations. The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the disclosure statement, table of contents, table of citations, certificate of compliance, and affidavit of service is 6,731.

Dated: July 22, 2020
New York, New York



Stefanie D. Coyle
Attorney for *Amicus Curiae*